

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

CHRYSAN INDUSTRIES, INC.

Employer

and

CASE 7-RC-21516

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 547-A, B, C, E, H, AFL-CIO

Petitioner

APPEARANCES:

Jeffrey N. Silveri and William M. Thacker, Attorneys, of Ann Arbor, Michigan,
for the Employer.

Phillip Schloop, of Detroit, Michigan, for the Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record of this proceeding¹, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The Employer filed a brief which has been carefully considered.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Employer is a Michigan corporation engaged in providing industrial chemicals and chemical services to DaimlerChrysler Corporation at various facilities. The facility at issue is DaimlerChrysler's Mack Avenue Engine Assembly Plant in Detroit, Michigan at which the Employer employs about 20 employees. Generally, the Employer manufactures, supplies and maintains all of the industrial chemicals used at the plant, including various oils, metal working fluids and cleaners. The Employer's employees are responsible for collecting and analyzing samples of the various fluids and making certain adjustments thereto, to assure that DaimlerChrysler's systems are operating at acceptable levels. The Employer is also responsible for the operation of a waste water treatment program at this facility. The Employer's activities at the plant are continuous, in that its employees are on site 24 hours a day, 7 days a week.

The Petitioner seeks to represent approximately 13 full-time and regular part-time hourly employees, including chemical technicians, chemists and the administrative assistant employed by the Employer at the DaimlerChrysler facility located at 400 St. Jean, Detroit, Michigan; but excluding all other employees, guards and supervisors as defined in the Act.² The parties disagree as to whether certain employee classifications should be included in the proposed unit. The Petitioner basically contends that all the Employer's hourly employees at the DaimlerChrysler plant (except the waste treatment employees) should be included in the unit, while the Employer asserts that three employees classified as shift supervisors, Jack Beck, Doug Massey and Warren Stallworth, should be excluded from the unit as statutory supervisors. The Employer also asserts that Premji Patel, a chemist, should be excluded because he is a professional employee, and that Administrative Assistant Portia Titus should be excluded because she is a confidential employee. Alternatively, the Employer contends that there is no community of interest between Patel and Titus and the rest of the unit.

The Employer is intimately involved in the day-to-day operations of the DaimlerChrysler plant. To that end, DaimlerChrysler has provided the Employer with a radio, which it uses to communicate urgent needs to the Employer. The highest ranking manager permanently situated on-site for the Employer is Program Manager Nathaniel Hackett. Whenever the program manager is on-site, usually from 6:00 a.m. to 6:00 p.m., he retains the radio and sends work orders to shift employees and shift supervisors via alphanumeric pagers. Although supposedly the only individuals who monitor the radio are the program manager and, in his absence, the shift supervisors, recently Chemical Technician Jason Funchar had been

² The parties stipulated to the exclusion of two employees employed at the waste treatment facility located at the Mack Avenue Plant, making the requested unit less than a plant-wide unit.

entrusted with the radio on weekends. There is also evidence that other unit employees have been assigned to monitor the radio on occasion. Because of the urgent nature of the radio calls from DaimlerChrysler, whoever possesses the radio is required to assess that situation and assign chemical technicians, based on their particular abilities and skills, to handle whatever tasks are required to address the call.

Shift supervisors are generally chemical technicians with the greatest experience, in that they have been employed by the Employer longer than other chemical technicians. Shift supervisors spend as much as 75 per cent of their work day performing the same tasks as the chemical technicians. Both chemical technicians and shift supervisors are hourly employees, although shift supervisors are entitled to a one dollar per hour raise upon being promoted from chemical technician. The starting hourly rate of pay for chemical technicians is \$10.00. Shift supervisors and chemical technicians both punch a time clock when starting and leaving work.

Shift supervisors have the authority to approve voluntary overtime for chemical technicians working on their shifts, which on the first shift is four employees, and on the second and third shifts is two employees. However, such authority is utilized judiciously and shift supervisors have been put on notice that they will be accountable for excessive overtime. Normally, overtime is authorized in circumstances where a job must be completed by a particular employee despite the end of the shift. However, it does not appear that shift supervisors can require chemical technicians to work beyond their scheduled shift. Shift supervisors assertedly also have the authority to approve or disapprove absences or tardiness by employees on their shifts, although employees who have been more than five minutes late to work have been told by shift supervisors that they need to discuss the issue with the program manager or with Suk-Kyu Koh, the Employer's director of chemical management programs who regularly visits the facility.

The Employer asserts that shift supervisors have the authority to discipline employees on their shifts. The most significant example of this authority involved the discharge of an employee in January 1999 by a former afternoon shift supervisor after the employee had been given several verbal warnings but continued to fail to show up to work despite promising to do so. The shift supervisor, along with the program manager and Koh, signed the termination report. Assertedly, the shift supervisor initiated the recommendation to terminate the employee, which was "rubber-stamped" by management, although the narrative contained in the termination report was prepared by the program manager. Clearly, a shift supervisor alone can not terminate an employee. The only shift supervisor to testify, Warren Stallworth, states that he had the occasion to issue one written verbal warning to an employee who had abused his break time. In issuing the warning, Stallworth had previously informed employees on his shift that it was unacceptable for them to return from their lunch breaks more than 10 minutes beyond the 30 minutes allotted by the Employer. Shift supervisor Doug Massey gave two chemical technicians "employee warning reports", although only one of the reports was contained in the record. That report provided a narrative as to the employee not showing up for work and failing to notify anyone what was going on when he telephoned the plant before

his shift. Other warning reports written by a former shift supervisor were for “carelessness” in causing an oil spill; for “disobedience” in violating a directive not to be on the “next line” unescorted; and for “work quality” by being out of contact and unable to be located in the plant for two hours. There is no indication in the record what effect, if any, this or any other warning had on the employee’s pay, or whether the warnings resulted in more serious disciplinary action.

While it is not clear from the record that shift supervisors have the authority to authorize additional lunch time, the record is clear that employees are required to request break time from shift supervisors, and shift supervisors have the authority, based upon their assessment of the labor needs at the time of the request, either to grant or deny such a request. The Employer asserts that, although it has never occurred, shift supervisors have the authority to approve vacation time for employees on their shifts. Shift supervisors have approved a day off without pay for chemical technicians.

Shift supervisors are also involved in the Employer’s decisions relating to the hiring of chemical technicians. Shift supervisors participate in the interview process and afterwards are informally asked for their recommendation, which the Employer asserts plays a “big role” in the hiring decision since the shift supervisor will be working closely with the chemical technician. Doug Massey was recently involved in the interviewing and hiring of Mike Galati, although he interviewed Galati separately from Hackett and Koh. After Massey’s interview with Galati, he was asked to provide a recommendation and Galati was hired.

The Employer utilizes a system of self-evaluation, wherein employees are asked to complete a form upon which they indicate what they feel are their strengths and what might be done to improve their performance. After the employee completes the form, he meets with Koh and the shift supervisor to discuss his performance.³ Shift supervisors sign the employees’ evaluations after the meeting. Based on the employee’s performance, shift supervisors are asked for recommendations as to a wage increase for the subject employee, which are routinely followed. The records indicate only one instance where a shift supervisor’s one dollar an hour pay increase was dropped to 75 cents by management based on the employees’ attendance problems.

Shift supervisors are responsible for writing and submitting “shift summaries” at the end of each shift, which accounts for the bulk of their non-unit work activities. The Employer maintains two computers in its office, at least partially for the purpose of communication via an electronic mail system. Shift supervisors are given a password to enter the system. At the conclusion of each shift, they are required to record the events and work accomplished on their shift, as well as any tasks that remain incomplete at the conclusion of the shift. The shift supervisor for the next shift then retrieves the shift summary, and directs chemical technicians

³ The record is unclear as to whether Koh will continue to be involved as the primary evaluator, or whether this is truly a function of the program manager.

to any unfinished tasks from the previous shift. The shift summary is also a method of communication with the program manager.

As for the administrative assistant, Portia Titus, she is an hourly employee, working five days per week from 9:00 a.m. to 5:00 p.m., paid at the rate of \$10.75 per hour. As the sole clerical employee at this facility, her duties include typing, answering phones and filing. She works in the Employer's office, removed from the work area of the other employees in the proposed unit. She handles administrative tasks relating to newly hired employees and maintains a variety of administrative files, including personnel files. She also routinely processes timecards for employees in the proposed unit. The Employer speculates that if the Petitioner, or any other labor organization, were to become the collective bargaining representative of the employees in the proposed unit, Titus would assist in the clerical aspects of processing grievances.

As to the Employer's two chemists at the Mack Avenue Plant, Premji Patel is an hourly employee paid at the rate of \$11 per hour and is assertedly under the direct supervision of "Senior Chemist" Manoj Desai.⁴ Patel has a bachelors degree in microbiology and the Employer has made no assertion that a chemistry degree is a requirement for this position, although Patel did have more than a decade of experience as a chemist in India. Patel's primary duties include the daily testing and analysis of samples of each of the fluid systems maintained by the Employer for its customer. The samples are collected by chemical technicians or shift supervisors, and delivered to Patel at the Employer's laboratory, which the Employer maintains at the Mack Avenue Plant. The laboratory is adjacent to the Employer's office at the facility and is separate from the working area of the shift supervisors, chemical technicians and the administrative assistant.

Patel conducts the tests independently and routinely. If he discovers, as a result of his analyses, that a particular fluid is out of the parameters established to enable that system to run according to specifications, he makes recommendations on corrective action. Desai has the ultimate authority to order the shift supervisors to take the corrective action recommended by Patel, or to order corrections of his own design. Desai can make such a determination without rerunning the tests conducted by Patel. Desai is also responsible for conducting other tests having to do with the waste water treatment plant, which are more sophisticated than those performed by Patel. In Patel's absence, a chemical technician would be unable to perform the tests necessary because they require more experience and a greater background in chemistry than that generally possessed by chemical technicians.

Section 2(11) of the Act defines a "supervisor" as:

⁴ The Petitioner did not seek to include Desai, who is salaried, in the unit, and the Employer contends Desai is a supervisor and should be excluded on that basis. Under these circumstances, I exclude Desai from eligibility to vote in the petitioned-for unit.

...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

An individual need possess only one of the enumerated indicia of authority in order to be encompassed by the definition, as long as the exercise of such authority is done in the interest of the employer and requires the use of independent judgment. **Big Rivers Electric Corp.**, 266 NLRB 380, 382 (1983). A party seeking to exclude an individual as a supervisor has the burden of establishing such status. **Northcrest Nursing Home**, 313 NLRB 491, 496 fn. 26 (1993). The legislative history of Section 2(11) indicates that Congress intended to distinguish between employees commonly referred to as “straw bosses” or leaders, who may give minor orders and oversee the work of others, but who are not necessarily perceived as part of management, from those supervisors truly vested with genuine management prerogatives. **George C. Foss Co.**, 270 NLRB 232, 234 (1984). The exercise of some supervisory authority in a merely clerical, perfunctory or sporadic manner does not require a finding that an employee is a supervisor within the meaning of the Act. **Somerset Welding & Steel**, 291 NLRB 913 (1988).

The record in the instant case supports a finding that shift supervisors have the authority to effectively recommend the discipline of employees, up to and including discharge. **Paramount Cap Mfg. Co.**, 119 NLRB 785 (1957). While basically narrative in form, the employee warning reports have nevertheless served as the basis for further disciplinary action. The warnings themselves can apparently be issued by the shift supervisor without prior approval of upper management, cover a wide range of ostensible misconduct, and have an impact on the tenure or status of chemical technicians. Shift supervisors also use their independent judgement in the direction of chemical technicians, given that they assign them to tasks based upon the labor needs of the Employer at the time and the shift supervisor’s own assessment of the employees’ skills and abilities. Shift supervisors are required to assess their workforce in deciding whether to grant lunch breaks and in determining which chemical technician to assign in response to DaimlerChrysler’s radio calls. See **R.C. Plastics, Inc.**, 255 NLRB 1238 (1981).

Shift supervisors have participated in the interviewing of job candidates and have made effective recommendations as to whether those candidates should be hired. **Lovilia Coal Co.**, 275 NLRB 1358 (1985). After hire, shift supervisors are involved in the performance evaluation of chemical technicians and make effective recommendations on wage increases. **El-Tech Research Corp.**, 300 NLRB 522 (1990). While shift supervisors apparently cannot require employees to work beyond their shift, they do exercise independent discretion whether to utilize overtime to complete work during a shift, and in deciding who should be awarded overtime. **Dale Service Corp.**, 269 NLRB 924 (1984). Consequently, based on the foregoing,

I find shift supervisors to be supervisors as defined in the Act, and they will be excluded from the petitioned-for unit.

Confidential employees are defined as employees who assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies with regard to labor relations, or regularly substitute for employees having such duties. Such employees are generally excluded from the prospective bargaining unit under Board policy. *Ladish Co.*, 178 NLRB 90 (1969); *B.F. Goodrich Co.*, 115 NLRB 722 (1956). However, the danger of precluding employees from bargaining collectively with employees sharing common interests mandates that the test be applied narrowly. *NLRB v. Hendricks County Electric Corp.*, 454 U.S. 170 (1981).

Titus basically functions as a secretary who handles timecards and personnel files in the course of her daily work. While Hackett and Koh are clearly employees who formulate, determine and effectuate management policies with regard to labor relations, the Employer has not met its burden of proving that Titus' relationship with them is of a confidential nature. It is the confidentiality of such a relationship, not the confidentiality of the information, that is determinative. *Greyhound Lines, Inc.*, 257 NLRB 477 (1981); *Ernst & Ernst National Warehouse*, 228 NLRB 590 (1977). The Employer speculates that should the Petitioner succeed in becoming the collective bargaining representative of the proposed unit, Titus would be responsible for administrative duties in handling the processing of grievances. However, those who may at some time in the future function as confidential employees, but who are not doing so at the time the determination is made, do not belong to this normally excluded category. *American Radiator Corp.*, 119 NLRB 1715 (1958). Thus, I do not believe the evidence supports a finding that Titus is a confidential employee.

Nonetheless, it is the policy of the Board not to include office clerical employees in production or maintenance, or other non-office clerical units, absent the consent of the parties. *Kroger Co.*, 204 NLRB 1055 (1973); *Hygera Coca Cola Bottling Co.*, 192 NLRB 1127, 1129 (1971). Since the Employer objects to Titus' inclusion in the petitioned-for unit, she will not be included in the unit found appropriate herein.

Section 2(12) of the Act defines a professional employee as:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgement in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or form of

apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Section 9(b)(1) of the Act prohibits the Board from deciding that a unit including both professional and nonprofessional employees is appropriate, unless a majority of the professional employees vote for inclusion in such a mixed unit. *Leedom v. Kyne*, 358 U.S. 184 (1958); *Lockheed Aircraft Corp.*, 202 NLRB 1140 (1973).

In making the determination as to whether a classification is deemed to be professional, the Board does not pass upon the qualifications of each employee in the classification, but rather upon the character of the work required of them as a group. *Avco Corp.*, 313 NLRB 1357 (1994); *Loral Corp.*, 200 NLRB 1019 (1972). In the instant case, Patel routinely performs tests upon fluids and compares the results to specific parameters established for each test. This discretion as to how to respond is governed by the specifications. The record does not indicate that any advanced college degree is required by the Employer for the chemist position, which appears to be reflected in a hourly wage that is comparable to the chemical technicians. Although the Employer asserts that a background in chemistry is required to conduct the tests, there is no evidence that a chemical technician, shift supervisor or any other individual could not be trained to conduct the same routine analyses. *Safeway Stores*, 174 NLRB 1274 (1969). Consequently, I do not find Patel to be a professional employee. Since Patel is hourly paid at basically the same rate as the chemical technicians, and his work in testing and monitoring fluids is of basically the same nature as the chemical technicians, I find that he possesses a sufficient community of interest to be included in the petitioned-for unit despite his ostensible separate supervision and work location since the nature of his work necessarily integrates him into the monitoring processes of the chemical technicians.

5. Accordingly, based upon the foregoing, a secret ballot election under the supervision of the undersigned shall be conducted among the Employer's employees in the following appropriate unit:⁵

All full-time and regular part-time employees, including chemical technicians and chemists employed by the Employer at the DaimlerChrysler Mack Avenue Engine Assembly Plant located at 400 St. Jean, Detroit, Michigan; but excluding all other employees, office clerical employees, shift supervisors, guards and supervisors as defined in the Act.

⁵ The Employer's organization chart for the Mack Avenue Plant refers to a co-op student, Antonella Cipollone, but the record is silent whether that person remains employed and whether the parties intended to include this person in the unit. Consequently, if this person remains employed, she may vote subject to challenge by any party.

Those eligible shall vote as set forth in the attached Direction of Election.

Dated Detroit, Michigan, this 21st day of April, 1999.

(SEAL)

/s/ William C. Schaub, Jr.
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